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Nos. 87-1614, 87-1639, 87-1668

In The

Supreme Court of the United States

October Term, 1987

JOHN W. MARTIN, *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

RICHARD ARRINGTON, JR., *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OF RESPONDENTS ROBERT K. WILKS, *et al.*

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28 pp

QUESTIONS PRESENTED

1. Is a public employer immune from the discrimination claims of unconsenting nonminority employees if it claims to act pursuant to a consent decree which contemplates race conscious employment decisions?

2. Should a consent decree embodied affirmative action plan be treated as any other affirmative action plan when a nonparty challenges race conscious actions of an employer taken pursuant to the consent decree as discriminatory and beyond the scope of permissible affirmative action?

3. Is a public employer acting within the scope of permissible affirmative action when it promotes on a one black to one white basis, makes no findings of past purposeful promotional discrimination, does not consider the relative qualifications of the promotional candidates, and does not attempt to use any job related selection procedure?

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants

Richard Arrington, Jr.
City of Birmingham

Personnel Board Defendants

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas
Wanda Thomas

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Respondents Robert K. Wilks, *et al.* respectfully submit this brief in opposition to issuance of a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINIONS BELOW

Petitioners' citations of the decision of the Court of Appeals are correct.

Petitioners' citation of the decision of the District Court as *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985) is misleading.[1] The record entries which together constitute the final decision of the District Court are reprinted by petitioners in the Appendix at 27a - 76a. And, petitioners have provided a final compilation of the district court's findings in the Appendix at 77a - 109a.

JURISDICTION

Respondents agree with the petitioners' allegations of jurisdiction to consider the Petitions.

[1] As noted by petitioners Arrington, *et al*, petition at 2 n.2, the FEP reported decision does not contain additional post-trial findings, conclusions and modifications of the District Court's order which were made upon consideration of respondents' Rule 59 Motion. App. at 69a - 76a.

STATEMENT OF THE CASE

Respondents Robert K. Wilks, *et al.* are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City's Engineering Department.[2] App. at 82a, ¶ 1. Each would have been promoted to a position as a Fire Lieutenant or Fire Captain or Civil Engineer but for the race conscious actions of the City of Birmingham ("City"). App. at 79a. Beginning in April 1982, these respondents filed individual suits against the City, its Mayor, and the Personnel Board of Jefferson County defendants ("Personnel Board") under Title VII and the Equal Protection Clause.[3]

The defense rested on claims of compliance with consent decrees entered in *United States v. Jefferson County*, 28 FEP Cases (BNA) 1834 (N.D. Ala. 1981). App. at 37a.

[2] In addition, an association of employees of the City is a plaintiff-respondent. App. at 67a.

[3] Claims under 42 U.S.C. § 1981 and state law were also alleged. The suits were filed at the time of the denial of promotional opportunities to the individual plaintiffs, and, in most cases, after exhaustion of administrative remedies before the Equal Employment Opportunity Commission. While the first two complaints made reference to the consent decrees, and sought preliminary relief against implementation of race conscious promotions, the later complaints made no reference to the decrees and simply sought relief due to the discriminatory conduct of the defendants. *Compare*, Wilks complaint, R17-1-1, *et seq.*, to Bennett complaint, App. at 110a.

Those decrees were entered in settlement of race and sex discrimination cases filed in 1974 and 1975 by various private parties and the United States.[4] App. at 236a - 246a. After the proposed consent decrees with the City and Personnel Board were announced in June 1981, the Birmingham Fire Fighters Association filed objections to certain decree provisions as required by the public notice. App. at 238a. A "fairness hearing" was held by the District Court on August 3, 1981, App. at 238a, and the decrees were approved on August 21, 1981, App. at 247a. Prior to entry of the decrees, the union sought to intervene in the consent decree cases. The consent decree parties vigorously opposed intervention by the union. The union's motion was denied at the time of entry of the District Court's order approving the consent decrees. App. at 246a.

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[4] In 1977, the District Court found that the entry-level Police Officer and Firefighter tests used by the Personnel Board adversely impacted upon black applicants and were not shown to be job-related under the EEOC Guidelines. The trial court further found that the Personnel Board had not intentionally discriminated against blacks, was not guilty of a constitutional violation, and, in fact, had made efforts for several years to bring blacks into public employment. *Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 at 6795 (N.D. Ala. 1977). The assertion by the Martin petitioners that the court ordered the Board to certify "for promotion specified ratios of blacks and whites" is false. Martin petition at 6. At no time has any finding been made by the District Court regarding promotional examinations used by the Board. Nor were any findings of discrimination made against the City of Birmingham.

The Court of Appeals for the Eleventh Circuit upheld the denial of intervention by the union. The appeals court found that no prejudice should result to the union or its members because entry of the decrees would not preclude an individual nonparty harmed by the City's implementation practices from asserting an independent claim of discrimination. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). The Court also recognized that the individual plaintiffs could not file suit until they were personally denied promotion after approval of the settlement. No party sought review by this Court.

During April 1984 the District Court consolidated the various discrimination claims of the respondents and other nonminority City employees under the master caption file *In re: Birmingham Reverse Discrimination Employment Litigation*. It was later determined to first try the claims of the BFRS and Engineering Department plaintiffs. In an effort to narrow the scope of pretrial preparation, the District Court entered pretrial orders finding that the respondent plaintiffs were required to prove that the promotions of the black promotees were not required by the terms of the consent decrees. App. at 27a, 28a. In those orders, the District Court summarily found without a trial, summary judgment motion, or other hearing, that the consent decrees were valid and lawful. See, *In re: Birmingham Reverse Discrimination Employment Litigation*, 37 FEP Cases (BNA) 1 (N.D. Ala. 1985); Transcript of May 14, 1984 hearing, at 20-22. Consent decree compliance, rather than the standards of Title VII or the Equal Protection Clause, became the only

issue for trial. And, respondents were limited by the trial judge to present evidence on that single issue.[5]

At the conclusion of the five day bench trial, the District Court found that the respondents had failed to prove that the contested promotions were not required by the terms of the City consent decree. It therefore upheld the promotions, repeating again without explanation its previously announced ruling that the City consent decree "is lawful." App. at 106a.

The Court of Appeals for the Eleventh Circuit reversed finding that respondents had never been given a trial on their individual Title VII or Equal Protection claims. *In Re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1500 (11th Cir. 1987); App. at 17a. The appeals court held, as to non-

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[5] The Court determined that the only factual issue was whether, under the terms of the consent decree, the black promotees were demonstrably less qualified than the respondents. Paragraph 2 of the City Decree provides: "Nothing herein shall be interpreted as requiring the City to . . . promote a person who is not qualified, or to . . . promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. at 124a. The City contended that paragraph 2 had never been "invoked" by the City, and it was therefore irrelevant and not considered in making promotions. Indeed, the City admitted, and the District Court found, that the City promoted the black candidates without consideration of the relative qualification of all candidates. App. at 105a. In addition, the District Court required the respondent plaintiffs to prove that the City knew at the time of promotion that the black promotees were demonstrably less qualified. App. at 28a, 29a.

parties such as respondents Wilks, *et al.*, a consent decree embodied affirmative action plan is entitled to no more preclusive effect against that nonparty than a voluntary affirmative action plan. The District Court was directed on remand to evaluate the race based conduct of the petitioners under the standards of *Johnson v. Transportation Agency*, 480 U.S. ___, 94 L.Ed.2d 615 (1987) (Title VII) and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (Equal Protection Clause). 833 F.2d at 1500, 1501; App. at 19a. Finally, the appeals court noted that the District Court's interpretation of the language of paragraph 2 of the City consent decree that it "permits the City to make race conscious promotions without using *any* job-related selection procedure" creates a natural potential for the trammelling of the interests of nonminority employees which warranted "heightened scrutiny" by the District Court on remand. 833 F.2d at 1501; App. at 19a, 20a (emphasis in original).

ARGUMENT

I. The Court of Appeals Correctly Ruled That A Consent Decree Does Not Immunize A Defendant From the Discrimination Claims of Nonparties.

A. This Court has already decided that a Title VII consent decree is akin to a voluntary affirmative action plan.

Just two terms ago, this Court discussed the voluntary nature of a Title VII consent decree in *Local No. 93*

v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). Noting that the obligations of a consent decree are created by the agreement of the parties rather than the force of law, this Court recognized that "the voluntary nature of a consent decree is its most fundamental characteristic." *City of Cleveland*, 92 L.Ed.2d at 423. Indeed, this Court likened the entry of a consent decree in settlement of discrimination litigation to other permissible voluntary affirmative action by employers or unions designed to eradicate the effects of past discrimination. The only difference, this Court held, is the additional remedy, to which the parties have voluntarily submitted, of the court's contempt power to ensure an employer's compliance with a consent decree embodied affirmative action plan. 92 L.Ed.2d at 424. This Court went on to recognize that, given the managerial discretion reposed in employers to voluntarily adopt affirmative action plans that might include relief broader than that which a court could order under § 706(g), a district court is authorized to enter a consent decree containing a voluntary affirmative action plan in settlement of discrimination litigation. Due to its voluntary nature, a consent decree is, therefore, not the sort of court order subject to the limitations placed on the orders of federal courts by § 706(g) of Title VII. *City of Cleveland*, 92 L.Ed.2d at 423. Without holding that the affirmative action aspects of a consent decree are the equivilent of a voluntary plan, this Court could not have reached the result in *Cleveland*.

The *Cleveland* Court cautioned, however, that "the fact that the parties have consented to the relief

contained in a [consent] decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment." *Cleveland*, 92 L.Ed.2d at 426. Finally, this Court refused to allow an unconsenting union to block entry of a consent decree wherein plaintiffs and an employer resolve their differences through adoption of a decree embodied affirmative action plan. 92 L.Ed.2d at 427, 428.

The Eleventh Circuit panel correctly followed *Cleveland* when it wrote:

> . . . even if a consent decree purports to affect the rights of third parties, those parties are not bound by the terms of the decree unless their interests were adequately represented by a party to the decree. *See Local No. 93 v. City of Cleveland*, ___ U.S. ___, 106 S.Ct. 3063, 3079, 92 L.Ed.2d 405 (1986) ("A courts approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting [parties]; if properly raised, these claims remain and may be litigated by the [nonconsenting parties]".) The policy of encouraging voluntary affirmative action plans must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 589 n.4, 104 S.Ct. 2576, 2593 n.4, 81 L.Ed.2d 483 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees.").

833 F.2d at 1498; App. at 14a, 15a.

Following this Court's decision in *Cleveland*, the Eleventh Circuit correctly held that a consent decree

embodied plan is entitled to no more preclusive effect than one not entered by a court in settlement of discrimination litigation. 833 F.2d at 1498; App. at 13a.[6] There is no need for this Court to revisit the issue.

B. This case involves a different issue and factual context than that which was not resolved in *Marino v. Ortiz.*

During the current term, this Court was equally divided when it considered *Marino v. Ortiz*, No. 86-1415, ___ U.S. ___, 108 S.Ct. 586, 98 L.Ed.2d 629 (Jan. 13, 1988). The issue in *Marino* was "whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation." In *Marino*, petitioners filed an independent lawsuit asserting an equal protection claim. Their theory was that blacks with test scores equal to those of petitioners should not be promoted under the terms of a consent decree that had been proposed in another case. The Second Circuit panel noted that "[a]lthough [petitioners] had no expectation of promotion since they had failed the examination, they demanded that they too be made sergeants." *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986). The

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[6] The Eleventh Circuit's rejection of the no collateral attack doctrine was first announced in *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). At that time, the appeals court noted that its analysis paralleled the discussion of *Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari). See, *Jefferson County*, 720 F.2d 1511 at 1519 n.20. The *Ashley* dissent was relied upon in this Court's *Cleveland* decision. 92 L.Ed.2d at 423, 428.

appeals court found that the suit was an impermissible effort to block entry of a consent decree that had been proposed in another case.

In *Marino*, petitioners were directly attacking a proposed consent decree in which their interest was speculative at best. At the time of their suit, the petitioners had suffered no harm; and, they had no right or expectation of promotion that was to be denied under the terms of the decree. Rather, petitioners were aggrieved by the fact that blacks who failed the civil service test would receive promotions while they, whites who had failed the same test, would not receive the same treatment. Petitioners' suit was correctly dismissed by the District Court, for the simple reason they were denied nothing on the basis of their race.

In this case, respondents are individual white male employees who exhausted their administrative remedies before the EEOC and filed suit after they were individually denied promotions as a direct result of race conscious actions which respondents contend are not within the ambit of permissible affirmative action. Indeed, respondents' suits are the very actions envisioned by this Court's recent decisions. *See, City of Cleveland*, 92 L.Ed.2d at 428, 429 (O'Connor, J., concurring); and, *e.g., W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983) (employer that voluntarily submits itself to conflicting obligations is cornered by its own actions). See also, *Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari).

The *Marino* case was nothing more than a separate suit to halt entry of a consent decree by nonparties that

would suffer no personal loss or harm as a result of the proposed decree. Here, respondents were not parties to the decree, and directly suffered in the course of the City's implementation of the settlement.

The issue in this case is not the lawfulness of the decrees. Nor is this case a facial attack on the decrees. The issue is the validity of the race conscious *conduct* of the defendants. *Marino* was not that type of case.

C. The Courts of Appeals are now correctly following the *Cleveland* decision.

Petitioners assert that certiorari should be granted because of a split in the decisions of the circuits. Arrington petition at 6; Martin petition at 12; Personnel Board petition at 5, 6. Citing a series of cases from six circuits,[7] and contrary decisions from the Seventh and Eleventh Circuits, the petitioners claim this Court's intervention is necessary to resolve the "no collateral attack" doctrine.

With the exception of the unique facts of *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), which follows the

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[7] Petitioners cite *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), aff'd, 108 S.Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds, *sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981). See Arrington petition at 6.

Second Circuit's earlier decision in *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y.) *affirmed mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), all of the "no collateral attack" cases cited by petitioners predate this Court's decision in *Local No. 93 v. City of Cleveland, supra* by several years. And, the two circuits which have addressed the issue on a clean slate since the *Cleveland* decision have rejected the no collateral attack doctrine. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1987); *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). Respondents suggest that since *Cleveland* was decided, the Courts of Appeals have correctly rejected the "no collateral attack" doctrine. Assuming there was once a conflict among the circuits, that conflict was resolved by *Cleveland* and simply no longer exists.

D. The Court of Appeals correctly recognized the fundamental unfairness of binding a non-party to an agreement he had no part in making.

The Court of Appeals recognized that due process mandates that a party have an opportunity to be heard if he is to be bound by a judgment:

> It is a fundamental premise of preclusion law that "[a] nonparty to a prior decision cannot be bound by it unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated." *Wilson v. Attaway*, 757 F.2d 1227, 1237 (11th Cir. 1985). As the Supreme Court has emphasized, this premise is required by due process: "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v.*

Shore, 439 U.S. 322, 327 n.7, 99 S.Ct. 645, 649 n.7, 58 L.Ed.2d 552 (1979).

833 F.2d at 1498; App. at 13a. Finding that the individual plaintiff-respondents were neither parties nor privies to parties to the consent decrees, their claims did not accrue until after the decrees became effective and the challenged promotions made, and their union's appearance at a fairness hearing could hardly be deemed sufficient to make them parties to the decrees, the appeals court refused to bind the nonminority plaintiff-respondents to the terms of the decrees.[8]

Petitioners claim the employer should be immune from discrimination claims because of its new-found penchant toward voluntary compliance with Title VII. The logical conclusion from their argument is that respondents' individual rights under the Constitution can be surrendered at the will of their employer. This Court has consistently recognized the strong public policy in favor of voluntary compliance with this nation's laws designed to eradicate discrimination. See, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). But, individual rights cannot be sacrificed under the guise of voluntary compliance. *Alexander* recognized that "there can be no prospective waiver of an employee's rights under Title VII. . . .Title VII's strictures are absolute and represent a congressional concern that each employee be free from discriminatory practices." 415 U.S. at 51. More recently this Court rejected the notion

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[8] *See*, 833 F.2d 1498, 1499; App. at 15a. The District Court's finding that neither plaintiffs, nor their privies, were parties to the decrees, App. at 105a, is not clearly erroneous.

that employment opportunities may be prospectively waived or allocated among racial groups at the expense of unconsenting individuals. See, *Connecticut v. Teal*, 457 U.S. 440, 453 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.' "); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 90 L.Ed.2d 260, 273 n.8 (1986) ("Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups," and, a race based plan "cannot justify the discriminatory effect on some individuals because other individuals had approved the plan.") (Powell, J., joined by Burger, Ch.J., and Rehnquist, J.). Indeed, whether the respondents could have intervened in the consent decree case is not the issue.[9] These individual nonminority employees were denied promotions on the basis of their race and have yet to have a day in court to assert that the *conduct* of the defendants is outside the scope of constitutional affirmative action. No union, employer, other third party, or district judge conducting a "fairness hearing," should be able to waive that right of the individual to be free from discriminatory practices.

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[9] It is curious that the City, which vigorously and successfully opposed intervention by the union in the consent decree cases, now claims that these individual respondents "intentionally bypassed[ed] an adequate opportunity to intervene. . . ." Arrington petition at 8. See also, *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

II. The Court of Appeals Properly Remanded With Instructions to Carefully Evaluate the Race Conscious Conduct of the Defendants.

A. *Wygant v. Jackson Board of Education* and *Johnson v. Transportation Agency* provide the correct standards to review a public employer's voluntary race based conduct.

The District Court was directed to evaluate the defendant's voluntary race based conduct under this Court's recent decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (Constitution) and *Johnson v. Transportation Agency*, 480 U.S. ___, 94 L.Ed.2d 615 (1987) (Title VII). The fact that those cases involved voluntary plans rather than consent decrees is irrelevant. The appeals court wrote: "In both instances, the employer has embarked on a voluntary undertaking; we reject any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination." 833 F.2d at 1501; App. at 19a. Indeed, that is the logical inference one must draw from this Court's *Cleveland* decision.

In *Johnson, supra,* this Court gave lower courts much needed direction and guidance on the parameters of an affirmative action plan which passes muster under Title VII. Drawing heavily upon Justice Powell's process of evaluation for voluntary race based conduct in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court found that a plan which takes race into account may use race as a single "plus"

factor in evaluating the relative qualifications of the candidates. No position should be set-aside solely on the basis of race; and, a realistic goal should be based on the availability of blacks or women in the relevant labor pool.

In this case, the District Court found that the City never compared relative qualifications, made no attempt to use a job-related selection procedure, and simply alternated between blacks and whites in making promotions. App. at 69a - 75a, 105a, 106a.[10] Moreover,

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[10] The testimony of Birmingham Fire Chief Gallant illustrates the City's failure to consider qualifications in making promotional decisions:

> Q. At the time [black promotee] Tony Jackson was promoted to Captain, did you form a judgment as to whether he was qualified to perform the duties of a Captain?
>
> A. No, I did not.
>
> Q. You did not?
>
> A. No, I did not.
>
> Q. . . . At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of [white candidate] David Brand?
>
> A. I did not.
>
> Q. At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of [white candidate] Mickey Martin?
>
> A. I did not.

PX 31, pages 325, 326.

the City arbitrarily employed an annual Fire Lieutenant promotional ratio of 50% when blacks comprised only nine to thirteen percent of the potentially qualified labor pool from which Fire Lieutenants are drawn. App. at 106a. Indeed, Birmingham's "plan failed to take distinctions in qualifications into account," and dictated "mere blind hiring by the numbers." *Johnson*, 94 L.Ed.2d at 633, 634. Race was not a single plus factor considered in making promotional decisions by Birmingham's Fire Chief, it was the only factor. Moreover, in view of the relatively small qualified black labor pool, this one-for-one promotional plan is hardly narrowly-tailored.

B. The District Court was properly directed to subject Birmingham's race based conduct to heightened scrutiny on remand.

Noting that under the District Court's interpretation of the consent decrees, the City was permitted to not use *any* job-related selection procedure in selecting Fire Lieutenants, the appeals court directed that the decree embodied plan be subjected to "heightened scrutiny" on remand because of the increased potential for trammelling under such an arrangement. App. at 20a.[11]

It is beyond peradventure that courts should examine with extreme care any race based conduct by a public actor. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their

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[11] When it approved the decrees in 1981, the District Court employed the "reasonableness" standard, Appendix at 238a, 246a, which was rejected in *Wygant*, 90 L.Ed.2d at 272, 281.

ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,' " *Loving v. Virginia*, 388 U.S. 1, 11 (1967) quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Thus, the scope of judicial inquiry in cases where racial distinctions are involved is necessarily more intense. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the *most exacting judicial examination.*" *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.) (emphasis added). "Any preference based on racial or ethnic criteria must necessarily receive *most searching examination . . .* " *Fullilove v. Klutznik*, 448 U.S. 448, 491 (1980) (Burger, Ch.J.) (emphasis added). The "means chosen by a state to accomplish its race conscious purposes" must meet "a *more stringent standard*". *Wygant v. Jackson Board of Education*, 476 U.S. 276, 90 L.Ed.2d 260, 272 (1986) (Powell, J.) (emphasis added). "[R]acial classifications of any sort must be subjected to '*strict scrutiny*,' however defined". *Wygant*, 90 L.Ed.2d at 275 (O'Connor, J., concurring in part) (emphasis added). Under the foregoing decisions, heightened, searching, stringent, exacting or strict scrutiny are all appropriate when considering race based conduct of a public actor. The admonition to the District Court to employ "heightened scrutiny" was well within the guidelines of this Court's decisions.

III. If Certiorari is Granted, This Case Provides an Appropriate Opportunity for a Reexamination of *Steelworkers v. Weber.*

The Court of Appeals properly followed this Court's precedents in directing the District Court to use the formulas for evaluation of race based conduct of *Johnson* (Title VII) and *Wygant* (Constitution). Consequently, these respondents believe certiorari is due to be denied in this case. But, these respondents are also aware that, in view of the affirmance of *Marino,* the Court may wish to consider Question 1 (no collateral attack doctrine). Should the Court grant the petitions, its review should reach the appropriate standards for review of the defendants' conduct and the continued viability *vel non* of *Steelworkers v. Weber*, 443 U.S. 193 (1979).[12] *Johnson* is built upon this Court's decision in *Weber*. In *Johnson*, Justice O'Connor suggested that the result reached was determined by *Weber*, and no party was suggesting that *Weber* be overruled. *Johnson v. Transportation Agency*, 480 U.S. ___, 94 L.Ed.2d 615, 641 (1987) (O'Connor, J.). Justices White, Scalia, and the Chief Justice wrote that *Weber* should be overruled. *Id.*, 94 L.Ed.2d at 647, 657.

This case presents an appropriate opportunity to reconsider *Weber*. The instructions of the Court of Appeals are expressly premised upon *Weber, Johnson* and *Wygant*. The petitioners have claimed that the

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[12] These respondents suggested to the Court of Appeals that *Weber* should be overruled. See, Supplemental Brief of Wilks, *et al.*, at 10.

appeals court incorrectly applied *Weber* and *Johnson*. Martin petition at 14-20. This case contains a complete record of the proceedings which resulted in the consent decrees, the conduct of the defendants in implementing their plan, and the relative qualifications of the competing white and black candidates. Reconsideration of *Weber* would be appropriate in this case.

CONCLUSION

Respondents Robert K. Wilks, *et al.* respectfully urge the Court to deny the petitions for writ of certiorari to the Court of Appeals for the Eleventh Circuit. If the petitions are granted, *Weber* should be reconsidered in the process of this Court's review.

May 20, 1988

Respectfully submitted,

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